Supreme Court, U.S.
FILED

961720 APR 28 1997

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1996

PHILLIP JEROME JONES,

Petitioner,

vs.

THE STATE OF TEXAS,

Respondent.

On Petition For Writ Of Certiorari
To The Court Of Appeals, Ninth District Of Texas
At Beaumont, Texas

PETITION FOR WRIT OF CERTIORARI

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April 28, 1997

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QUESTIONS PRESENTED

(1) Does the conviction herein violate Federal standards regarding sufficiency of the evidence on the basis that the evidence failed to establish the *actus reus* of the offense, thereby deciding an important question of federal law in a way that conflicts with relevant decisions of this Court?

(2) Does the decision of the Court of Appeals deny petitioner due process of law by failing to review the appellate complaint concerning factual sufficiency of the evidence?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, PHILLIP JEROME JONES, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals, Ninth District of Texas at Beaumont, Texas, holding that the evidence was sufficient to support the conviction of possession of a controlled substance and failing to review the issue of factual sufficiency.

OPINIONS BELOW

The opinion of the Texas Court of Appeals, Ninth District of Texas at Beaumont, Texas, is unpublished but appears in Appendix A to this petition as *PHILLIP JEROME JONES v. The State of Texas*, #09-95-126-CR, October 23, 1996.

This petition is timely filed in that it is filed seeking review of a lower state court judgment subject to discretionary review by the state court of last resort, the Texas Court of Criminal Appeals, Austin, Texas, within 90 days after the entry of the order denying discretionary review. The Texas Court of Criminal Appeals refused discretionary review on January 29, 1997. A copy of the order denying discretionary review by the Texas Court of Criminal Appeals appears in Appendix B to this petition.

JURISDICTION

The Court of Appeals, Ninth District of Texas at Beaumont's opinion in this matter was filed on October

23, 1996. The Texas Court of Criminal Appeals refused discretionary review on January 29, 1997. This Court's jurisdiction is invoked under Title 28 U.S.C. §1257, and pursuant to the U.S. Supreme Court Rule 10.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the U.S. Constitution, a copy of which is appended as Appendix C, is involved to the extent that the decision of the Court of Appeals, Ninth District of Texas at Beaumont, Texas, denied petitioner due process of law.

The statute upon which petitioner was convicted is Texas Controlled Substances Act, §481.112.

STATEMENT OF THE CASE

This petition involves a conviction arising from a prosecution in the 260th District Court of Orange County, Texas at Orange, Texas, of the felony offense of possession of a controlled substance. Petitioner raised the federal questions involved before the Court of Appeals, Ninth District of Texas at Beaumont, Texas, in the original Brief for Appellant timely filed with the Court of Appeals on September 11, 1995, by pointing out by specific citations references in the trial record and the various opinions requiring an acquittal based upon issues involving constitutional dimensions. Petitioner's original brief complaining of the insufficiency of the evidence and setting

out the original complaints warranting a reversal of the conviction is appended hereto as Exhibit D.

Petitioner, PHILLIP JEROME JONES, contends that the evidence was insufficient to support the conviction of possession of a controlled substance and that the Court of Appeals denied him due process by failing to review the issue of the factual insufficiency of the evidence. While a complete review of the evidence is necessary in order to evaluate this issue should this grant a writ of certiorari, petitioner details the pertinent evidence in the Reasons for Granting the Writ hereinbelow.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted for the reason that the Court of Appeals, Ninth District of Texas at Beaumont, Texas, has decided an important question of federal law in a way that conflicts with relevant decisions of this Court. The Court of Appeals issued an opinion that renders the decisions of this Court concerning insufficiency of the evidence to be of no consequence. Additionally, by failing to even review the factual insufficiency of the evidence, the Court denied petitioner due process.

> (I) ***Corpus delicti.*** "The body of a crime. In a derivative sense, the substance or foundation of a crime, the substantial fact that a crime has been committed." *Black's Law Dictionary, 4th Ed.*, 1968.

Petitioner contends that the evidence of possession of the controlled substance is remarkably underwhelming. The State simply failed to prove the *corpus delicti.* In

viewing the evidence in the light most favorable to the verdict as required by law, there was insufficient evidence to establish that petitioner committed the act of possession as alleged in the indictment.

The reasons compelling review by this court are several. The decision of the Court of Appeals holding that the evidence was sufficient to establish knowledge of the contraband, or the affirmative link, conflicts with decisions of other appellate courts, the same appellate court, and with applicable decisions of this Court and the United States Supreme Court. The Court of Appeals has in effect decided an important question of federal law in a manner in conflict with decisions of this Court and the Texas Court of Criminal Appeals. Petitioner complained that the evidence was insufficient to establish knowledge of the cocaine, or the affirmative link to establish knowing or intentional possession. The Court failed to address the issue for factual sufficiency, holding that nothing was presented for appellate review. Petitioner points out that he in fact addressed the factual basis of his complaint in his brief appended hereto as Appendix D, pointing out the evidence which compelled an acquittal. Petitioner pointed out that his vehicle was stopped for a traffic violation, at which time petitioner stepped out of his vehicle at the request of the investigating officer. After finding no contraband on petitioner, the investigating officer looked into the vehicle and found nothing in plain view. Petitioner readily agreed for the officer to search his vehicle. Following the search, the officer contended that he found a small rock of cocaine beneath the driver's (petitioner) seat, and confronted petitioner. Petitioner addressed the evidence, pointing out that it indicated that

he was calm, polite, and denied any knowledge of the contraband. Not only did the Court of Appeals fail to appreciate the factual insufficiency of the evidence, or address the issue, but even discussed the fact that petitioner was "very calm and very collected," somehow construing that as some indication of guilt! (Petitioner points out that the lack of such behavior, *i.e.* extreme nervousness, is routinely utilized as probable cause for officers to suspect an accused may be in possession of contraband.) Petitioner contends that the Court of Appeals was required to conduct a factual sufficiency review, which would have mandated a reversal of the conviction. *Clewis v. State*, 922 S.W.2d 126 (Tex. Crim. App. 1986). The Court of Appeals recognized the significance of the distinction between a review for legally sufficient evidence and factually sufficient evidence, recognizing that a legal sufficiency review is an analytical tool used to determine if there is a fact issue at all. *Jackson v. Virginia*, 443 U.S. 307, 61 L.Ed.2d 560, 99 S.Ct. 2781 (1979). Had the Court of Appeals conducted a factual sufficiency review, the Court would have found the facts strikingly similar to *Humason v. State*, 728 S.W.2d 363 (Tex. Crim. App. 1987), in which the accused was the driver and sole occupant of a pick-up truck, and was arrested for driving with a suspended license. The police found an open gym bag on the front seat next to him containing a vial of cocaine. The Texas Court of Criminal Appeals held that he could not be legally convicted for possessing a controlled substance unless the evidence affirmatively linked him to the cocaine and held that the evidence was insufficient. Contrary to the contention in the Court's opinion, the Texas Court of Criminal Appeals

has not totally disavowed *Humason, id.*, but merely has rejected the "outstanding reasonable hypothesis test." The applicable law pursuant to *Humason, id.*, and *Clewis, supra,* required the reviewing Court to reverse the conviction on the basis that the evidence is factually insufficient, which the Court wholly failed to do.

Notwithstanding the failure of the Court of Appeals to properly address the factual sufficiency issue, the evidence is also legally insufficient. As described hereinabove, the facts are strikingly similar to *Humason, supra,* and the "affirmative link" was not established. The decision of the Court of Appeals conflicts with *Brown v. State,* 911 S.W.2d 744 (Tex. Crim. App. 1995), and *Brown* is not controlling. The evidence legally failed to establish petitioner had any knowledge of the presence of the cocaine.

Despite the above appellate decisions, the appellate court *presumed* that knowledge was proven simply because it was *possible* that petitioner was guilty. A review of the evidence of the case at bar reveals that no rational trier of fact could have found that petitioner had knowledge of the presence of the contraband beyond a reasonable doubt.

"Possession" is defined as "actual care, custody, or management" Section 1.07(a)(39), Texas Penal Code. In holding that the evidence was sufficient to establish the "affirmative link," the decision of the Court of Appeals conflicts with numerous decisions involving similar facts, in which appellate courts have held the evidence to be insufficient to establish possession. *Allen v. State,* 786 S.W.2d 738 (Tex. App. – Fort Worth 1990); *McBride v. State,* 780 S.W.2d 823 (Tex. App. – San Antonio 1989); *Zertuche v.*

State, 774 S.W.2d 697 (Tex. App. – Corpus Christi 1989); *Baltazar v. State*, 638 S.W.2d 130 (Tex. App. – Corpus Christi 1982).

The evidence produced at trial and the factors discussed by the Court of Appeals in its decision established only that it is possible that appellant was in possession of the contraband. Such does not rise to the level or authorizes a rational trier of fact to find guilt beyond a reasonable doubt, based upon the evidence before the jury. Based upon the evidence produced at trial, petitioner was entitled to an acquittal. *Greene v. Massey*, 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed.2d 15 (1978); *Burks v. U.S.*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978).

The decision of the Court of Appeals therefore conflicts with the above-cited authorities, and has decided an important question of federal law contrary to existing authority and which should be resolved by this court. Even if petitioner is not entitled to an acquittal, petitioner is at the very least entitled to a factual sufficiency review which must result in a new trial. The Court of Appeals totally failed to address the issues on this basis, thereby denying petitioner the review to which he is entitled by due process.

Not only is the evidence in this cause insufficient to support the conviction, but it overwhelmingly establishes the innocence of petitioner Phillip Jerome Jones. The Court of Appeals did not even address the factual insufficiency issue, even though absolutely required by Texas law to review the properly raised issue. *Bell v. State*, 928 S.W.2d 566 (Tex. Crim. App. 1996). For this reason, petitioner urges that this Court grant a writ of certiorari to

review the opinion of the Court of Appeals, Ninth District of Texas, and that a judgment of acquittal be entered.

This Court should grant certiorari to determine these issues and to resolve the conflict between the opinion of the Court of Appeals, Ninth District of Texas, and this Court in the various cases relating to said issue.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals, Ninth District of Texas at Beaumont, Texas, in this case.

DATED: April 25, 1997

Respectfully submitted,

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APPENDIX A

In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-95-126 CR

PHILLIP JEROME JONES, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 260th District Court
Orange County, Texas
Trial Cause No. D940393

OPINION

(Filed Oct. 23, 1996)

A jury convicted appellant for having committed the felony offense of Possession of a Controlled Substance. Punishment was assessed by the trial court at confinement in the Texas Department of Criminal Justice – Institutional Division for a term of five (5) years, and a fine of $1,000. Appellant presents a single point of error[1] for our consideration, *viz:*

---

[1] We note that appellant labels his complaint as a "ground of error." We shall refer to it as a "point of error." *See* TEX. R. APP. P. 74(d); *Hicks v. State*, 860 S.W.2d 419, 422, n. 1 (Tex. Crim. App. 1993), *cert. denied*, ___ U.S. ___, 129 L.Ed.2d 848, 114 S.Ct. 2725 (1994).

> The State's evidence was legally and factually insufficient to support the jury verdict that Defendant, Phillip Jerome Jones, intentionally and knowingly possessed cocaine found in the automobile.

At the outset, we note the fact that appellant contends that the evidence in the instant case was not only legally insufficient to support the conviction, but factually insufficient as well. Appellant, however, offers no argument or authority in support of his factual insufficiency subpoint. We are aware of the recent case of *Clewis v. State*, 922 S.W.2d 126 (Tex. Crim. App. 1996), which does hold that intermediate appellate courts in Texas are permitted to conduct reviews of the evidence for factual insufficiency. As with all issues raised on appeal, factual sufficiency may be reviewed "if it is properly raised." *Id.* at 133. TEX. R. APP. P. 74(f) requires the "argument" of point of error to include "such discussion of the facts and the authorities relied upon as may be requisite to maintain the point at issue." A factual sufficiency review under *Clewis* requires an appellate court to "view[] all of the evidence without the prism of 'in the light most favorable to the prosecution.' . . . [and] set[] aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust." *Id.* at 129. The mechanics of such a review are obviously quite distinct from those concerning a review for legal sufficiency. This is not surprising as legal insufficiency and factual insufficiency provide separate and independent grounds for relief in the criminal law context. In the instant case, nothing is presented for appellate review on the issue of insufficiency, thus we decline address.

In reviewing the legal sufficiency of the evidence to support a conviction, we review all of the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found the essential elements to have been proven beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 61 L.Ed.2d 560, 99 S.Ct. 2781 (1979); *Geesa v. State*, 820 S.W.2d 154, 159 (Tex. Crim. App. 1991). The Court of Criminal Appeals emphasized the distinction between a review for legally sufficient evidence and one for factually sufficient evidence in the following language taken from *Clewis, supra.*

> A *Jackson* review, "viewing the evidence in the light most favorable to the prosecution," is not a factual sufficiency review; rather, it is an analytical tool used to determine whether there is a fact issue at all. [footnote and citation omitted] The *Jackson* standard "gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson*, 443 U.S. at 319, 99 S.Ct. at 2789.

Clewis, 922 S.W.2d at 133.

"Possession" is defined as "actual care, custody, control or management." TEX. PENAL CODE ANN. § 1.07(a)(39) (Vernon 1994). To prove unlawful possession of a controlled substance, the State must first prove appellant exercised actual care, control or management over the contraband and second, that appellant had knowledge the substance in his possession was contraband. *King v. State*, 895 S.W.2d 701, 703 (Tex. Crim. App. 1995). In the instant case, evidence exists that when appellant was confronted with the rock of cocaine found

directly under the driver's seat by the police officer, the following colloquy took place between the officer and appellant:

> [Officer Britt] Can you [appellant] explain where this came from?
>
> [Appellant] You didn't get that out of my car.
>
> [Officer Britt] Well, did you have someone else in your car with you?
>
> [Appellant] No. No one has been in my car.
>
> [Officer Britt] Well, it was under the seat.
>
> [Appellant] No. That wasn't in my car. My brother cleaned my car for me this afternoon.
>
> [Officer Britt] Well, do you think maybe your brother left it in your car?
>
> [Appellant] No. My brother didn't leave nothing in my car. You must have planted that.

Appellant's continued reference to the vehicle as "my car" evidences control over said vehicle in which the contraband was located. Appellant was driving and was the sole occupant of the vehicle. The remaining issue therefore would appear to be whether or not appellant had knowledge of the cocaine rock found beneath the driver's seat.

Circumstantial evidence of a defendant's guilty knowledge is not required to meet the same rigorous criteria for legal sufficiency as circumstantial proof of other offensive elements. *Brown v. State*, 911 S.W.2d 744, 747 (Tex. Crim. App. 1995). Proof of knowledge is an inference drawn by the trier of fact from all the circumstances. *Dillon v. State*, 574 S.W.2d 92, 94 (Tex. Crim. App.

1978); *Menchaca v. State*, 901 S.W.2d 640, 652 (Tex. App. – El Paso 1995, pet. ref'd). In affirming the validity of the use of "affirmative links" when analyzing circumstantial evidence in offenses involving possession of contraband items, the *Brown* Court expressly disavowed any cases, including *Humason v. State*, 728 S.W.2d 363 (Tex. Crim. App. 1987), that rely on the "alternate reasonable hypothesis" analytical construct. *Brown, supra* at 748. The *Brown* Court further expressly approved of the analysis conducted by the Fort Worth Court of Appeals in its affirmance of the conviction, after holding that the court was mistaken in abandoning the affirmative link analysis. *Id.* at 748-749. We will therefore apply the Fort Worth Court's analysis and reasoning in examining the evidence in the instant case including references to affirmative links between appellant and the contraband.

Texas courts have consistently held that mere presence at the scene of an offense is not sufficient to establish unlawful possession of a controlled substance. *McGoldrick v. State*, 682 S.W.2d 573, 578-579 (Tex. Crim. App. 1985). However, presence at the scene of an offense is a circumstance tending to prove guilt which, combined with other facts or circumstances, may be sufficient to establish guilt. *Beardsley v. State*, 738 S.W.2d 681, 685 (Tex. Crim. App. 1987). Our Court has recognized the following as factors tending to establish affirmative links of proof of knowledge in possession cases:

> (1) the accused was the owner of the premises in which the contraband was found;
>
> (2) the contraband was conveniently accessible to the accused;

(3) the contraband was found in close proximity to the accused;

(4) the place where the contraband was found was enclosed;

(5) the accused was the driver of the vehicle in which the contraband was found;

(6) the contraband was found on the same side of the car seat as the accused was sitting.

Dixon v. State, 918 S.W.2d 678, 681 (Tex. App. – Beaumont 1996, n.p.h.); *Watson v. State*, 861 S.W.2d 410, 414-415 (Tex. App. – Beaumont 1993, pet. ref'd), *cert. denied*, 511 U.S.___, 128 L.Ed.2d 376, 114 S.Ct. 1659 (1994).

In the instant case, evidence of the above six factors was present from the testimony of the state's witnesses. Additionally, the street upon which appellant's vehicle was initially observed parked was known as "Crack Alley" apparently in reference to the high incidences of drug trafficking occurring in the area. Further testimony also indicated that the driver's seat area next to the driver's door inside appellant's vehicle was contoured in such a way that if appellant had dropped the cocaine rock in that area, the rock could have rolled under the seat to the location where it was found. Appellant was also described by the officers as nonchalant, very calm and very collected. It has been held that an inference of knowledge from the lack of concern or surprise is proper. *United States v. Del Aguila-Reyes*, 722 F.2d 155, 158 (5th Cir. 1983); *Castellano v. State*, 810 S.W.2d 800, 807 (Tex. App. – Austin 1991, no pet.).

It must be remembered that a reviewing court's role is not to ascertian whether the evidence establishes guilt

beyond a reasonable doubt. *Stoker v. State*. 788 S.W.2d 1, 6 (Tex. Crim. App. 1989), *cert. denied*, 498 U.S. 951, 112 L.Ed.2d 333, 111 S.Ct. 371 (1990). When conducting a review for legally sufficient evidence, we do not resolve any conflict, weigh any evidence or evaluate the credibility of any witnesses, so that the fact-finding results of the jury are given great deference. *See Adelman v. State*, 828 S.W.2d 418, 421 (Tex. Crim. App. 1992). In the instant case, we find that the evidence contained in the record would permit any rational trier of fact to find appellant exercised control over and had knowledge of the contraband in question beyond a reasonable doubt. Viewing the evidence in the light most favorable to the prosecution, a fact issue was indeed raised on both issues. *Clewis*, 922 S.W.2d at 133. Appellant's point of error is overruled. The judgment and the sentence are affirmed.

AFFIRMED.

PER CURIAM

Submitted on May 23, 1996
Opinion Delivered October 23, 1996
Do Not Publish

Before Walker, C.J., Burgess and Stover, JJ.

APPENDIX B

OFFICIAL NOTICE FROM COURT OF
CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308 CAPITAL STATION,
AUSTIN, TEXAS 78711

January 29, 1997
COA#: 09-95-00126-CR
RE: Case No. 1645-96
STYLE: JONES, PHILLIP JEROME

On this day, the Appellant's Petition for Discretionary Review has been REFUSED.

Troy C. Bennett, Jr., Clerk

DOUGLAS M BARLOW
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APPENDIX C

AMENDMENT V TO THE UNITED STATES CONSTITUTION:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in times of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX D

NO. 09-95-00126-CR

IN THE COURT OF APPEALS IN AND FOR
THE NINTH SUPREME JUDICIAL DISTRICT
OF TEXAS, AT BEAUMONT

****

PHILLIP JEROME JONES,

APPELLANT

VS.

THE STATE OF TEXAS,

APPELLEE

****

APPEALED FROM THE 260TH DISTRICT COURT
ORANGE COUNTY, TEXAS

****

BRIEF OF APPELLANT

****

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(Filed Sep. 11, 1995)

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"The State's evidence was legally and factually insufficient to support the jury verdict that Defendant, Phillip Jerome Jones, intentionally and knowingly possessed cocaine found in the automobile."

NO. 09-95-00126-CR

IN THE COURT OF APPEALS IN AND FOR
THE NINTH SUPREME JUDICIAL DISTRICT
OF TEXAS, AT BEAUMONT

****

PHILLIP JEROME JONES,

APPELLANT

VS.

THE STATE OF TEXAS,

APPELLEE

****

APPEALED FROM THE 260TH DISTRICT COURT
ORANGE COUNTY, TEXAS

****

BRIEF OF APPELLANT

****

TO THE HONORABLE COURT OF APPEALS:

PHILLIP JEROME JONES, Defendant in Cause No. D-940393, in the 260th District Court of Orange County, Texas, Honorable Buddie Hahn, Judge Presiding, and

defendant before the Court of Appeals respectfully submits this brief to the respective courts for the purpose of appealing his conviction of POSSESSION OF A CONTROLLED SUBSTANCE, to-wit: COCAINE

For convenience, the parties will be referred to as the "Defendant" and the "State".

STATEMENT OF THE CASE

This is an appeal from a conviction of Possession of a Controlled Substance, to-wit: Cocaine.

The Defendant was driving his vehicle in the City of Orange, Orange County, Texas, on February 24, 1994. Officer Britt testified that at approximately 1:00 a.m., he observed a light gray Ford Probe turn north on Third (3rd) Street and come to a intersection and did not make a complete stop. Officer Britt radioed Officer Journeay and told him the defendant did not make a complete stop. Officer Journeay initiated his overhead lights and made the stop. Officer Britt came to the area of the stop and approached the Defendant, who was sitting in the driver seat of the Probe automobile. At that time, Officer Britt asked the Defendant to step out of the vehicle, and began to pat down the Defendant, nothing illegal or incriminating was found on the Defendant. Officer Britt looked into the vehicle and found nothing in plain view. The officer than asked the Defendant if he could "look" in his car and the Defendant responded "yeah, your're [sic] the Police, go ahead". Officer Britt found a very small rock of cocaine under the driver's seat. Officer Britt brought the rock of cocaine back to the Defendant to get him to

explain how the rock got into his car. When the Defendant was shown the rock of cocaine, he denied the rock was his and that no one had been in his care [sic] to leave the rock of cocaine, that his brother had cleaned his car and nothing was in it. Officer Britt asked "How did the rock get in your car"? The Defendant replied, "I guess you planted it there". S. F. Vol. 3 Page 45

Further, the Defendant was very calm, very polite, and nonchalant. S. F. Vol. Page 56 There was no evidence of any controlled substance on the Defendant; no evidence that the Defendant's physical condition indicated recent consumption of contraband; no evidence of any paraphernalia to use contraband; no evidence of how long Defendant had been driving the vehicle; no evidence of contraband in plain view; and no affirmative statement by the Defendant to connect Defendant to contraband.

GROUND OF ERROR NO. 1 RESTATED

The State's evidence was legally and factually insufficient to support the jury verdict that Defendant, PHILLIP JEROME JONES, intentionally and knowingly possessed cocaine found in the automobile.

ARGUMENT AND AUTHORITIES UNDER GROUND OF ERROR NO. 1

The Defendant is indicted for intentionally and knowingly possessing a controlled substance, to-wit: cocaine.

The State must prove beyond a reasonable doubt at least two evidentiary requirements which are as follows:

1. The State must prove that the Defendant exercised care, control and management over the substance; and

2. That he (the Defendant) knew what he possessed was contraband.

"Possession" means "actual care, custody and control. Health and Safety Code Sec. 1.02(34) formerly V.A.C.S. Article 4476-15. Possession is a voluntary act if the possessor knowingly obtains or receives the thing possessed or is aware of his control of the thing possessed for a sufficient time to permit him to terminate his control. Health and Safety Code, V.A.C.S. Article 481.112, formerly 4476-15 Sec. 1.02 (34).

Intentionally is defined as "a person acts intentionally, or with intent, with respect to the nature of his conduct when it is his conscious objective or desire to engage in the conduct or result. V.A.C.S. Penal Code 6.03(a).

Knowingly is defined as "a person acts knowingly, or with knowledge with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonable certain to cause the result". V.A.C.S. Penal Code 6.03(b)

The State must prove at a minimum, that the Defendant be aware that his conduct or circumstances surrounding his conduct constitutes possession of controlled substance.

It is not enough for the State to show that a Defendant was merely present in the vicinity of the cocaine. *Bucklin v. State* 634 SW2nd 44 (Ct. App. Bmt. 1982).

However, the State may prove these elements circumstantially. *McGoldrick v. State* 682 SW2nd 573, (S78 Tex. Crim. App. 1985)

The State must show the Defendant was *aware* that his conduct or the circumstances surrounding his conduct constituted possession of a controlled substance. *Humason v. State* 728 SW2nd 363 (Tex. Crim. App. 1987)

Proof that amounts to only a strong suspicion or mere probability is insufficient to support a conviction. *Humason v. State* 728 SW2nd 365. The evidence must establish affirmative links, beyond mere presence, between Defendant and the controlled substance. *Humason v. State* 728 SW2nd 365.

Defendant, Phillip Jerome Jones' immediate response to Officer Britt was "it's not mine, you must have planted it" SF. Vol 3 page 45. The Defendant was calm and did not attempt to flee. There is no evidence that the record that Defendant had sole access to the Probe automobile prior to the stop. In fact, the Probe automobile had been washed and vacuumed. SF Vol. 3 pg. 45.

There is no evidence in the record that Defendant owned the Probe. Furthermore, there is no evidence in the record that the Defendant had some connection to the controlled substance, other than physical proximity or that the defendant was familiar with cocaine in general.

The only affirmative link is that the Defendant was driving in his own neighborhood.

In anticipation of the State argument that the Defendant stopped at a residence which was suspected of having drugs. Defendant's reply that visiting a house is not probative evidence that defendant knew that the residence was doing drugs.

Taken together, these "links" shows the Defendant in his own neighborhood and visited a residence for some unknown reason, cannot infer from the evidence that the Defendant was aware of cocaine found in his car. The State has failed to show any common "link" of controlled substance, other than *mere presence,* to the Defendant.

There is no evidence that the cocaine was in plain view, no furtive gestures, no attempt to escape, no incriminating statement, no traces of cocaine or drug paraphernalia on Defendant's person, no evidence that the Defendant was under the influence of a controlled substance or cocaine, no evidence that the Defendant had sole access to the vehicle, no evidence of ownership of the vehicle or consciousness of guilt. *Whitworth v. State,* 808 SW2nd 566, 569 (Tex. App. 1991, pet. ref'd)

The State has failed to prove the mens rea element of "knowingly" and intentionally possession beyond a reasonable doubt.

Thus, to show possession, the evidence must affirmatively link the defendant to the cocaine by showing the indicia of possession set out in the charge. *McGoldrick v. State* 682 SW2nd 573 (Tex. Crim App. 1985), which the State has failed to prove.

The State's evidence is factually insufficient as well as legally insufficient to sustain a conviction.

CONCLUSION

For the reasons stated, it is respectfully submitted that the verdict in said cause upon Appellate Review of the Court of Appeals be reversed for insufficient evidence factually and legally.

Respectfully submitted,

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ATTORNEY FOR
APPELLANT

REQUEST FOR ORAL ARGUMENT

Attorney for Appellant hereby makes his request that this matter be set before this Honorable Court of Appeals for Oral Arguments.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above was served on opposing counsel, the Orange County District Attorney's Office, Orange County Courthouse, Orange, Texas 77630 in accordance with the Texas Rules of Civil Procedure on September 11, 1995, by certified mail, return receipt requested or hand delivery.

/s/ Jim Sharon Bearden
JIM SHARON BEARDEN